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## **Title 76: Criminal Code Chapter 04 Inchoate Offenses - 1995 Replacement Volume**

Utah Code Annotated

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(i) When the court determines that claimants have no right in the vehicle in whole or in part, it shall declare the vehicle to be forfeited and direct it to be delivered for disposition in accordance with Subsection (7).

(j) When the court determines that the vehicle, in whole or in part, is not subject to forfeiture, it shall order release of the vehicle to the proper claimant. If the court determines that the vehicle is subject to forfeiture in part and release in part, it shall order partial release and partial forfeiture. When the vehicle cannot be divided for partial forfeiture and release, the court shall order it sold and the proceeds distributed:

(i) first, proportionally among the legitimate claimants;

(ii) second, to defray the costs of the action, including seizure, storage of the vehicle, legal costs of filing and pursuing the forfeiture, and costs of sale; and

(iii) third, in accordance with Subsection (7).

(k) In a proceeding under this section where forfeiture is declared, in whole or in part, the court shall assess all costs of the forfeiture proceeding, including seizure and storage of the vehicle, against the individual or individuals whose conduct was the basis of the forfeiture, and may assess costs against any other claimant or claimants to the vehicle as appropriate.

(7) When any vehicle is forfeited under this section by a finding of the court that no person is entitled to recover it or that the vehicle is subject to forfeiture in part and release in part to a claimant, a court shall order that the vehicle be delivered to the seizing agency for sale as the court directs. The court shall also order that the proceeds from the sale of the vehicle be distributed in accordance with the provisions of Subsection (6)(j).

(8) When the court orders that a vehicle be forfeited, in whole or in part, under this section, it shall direct that the proceeds from the sale of the forfeited vehicle, or part thereof, be divided or distributed as follows:

(a)  $\frac{3}{4}$  to the agency making the seizure; and

(b)  $\frac{1}{4}$  to the state treasurer for deposit into the General Fund.

(9) If the vehicle is found by the court not to be subject to forfeiture, it shall be released to the owner.

**History:** C. 1953, 76-3-501, enacted by L. 1994, ch. 258, § 1.

**Effective Dates.** — Laws 1994, ch. 258, § 2 makes the act effective on March 21, 1994.

## CHAPTER 4

### INCHOATE OFFENSES

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##### Attempt

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76-4-101.  
76-4-102.

Attempt — Elements of offense.  
Attempt — Classification of offenses.

#### Section

76-4-202.

76-4-203.

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Conspiracy — Classification of offenses.

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76-4-302. Conviction of inchoate and principal offense or attempt and con-

spiracy to commit offense prohibited.

## PART 1 ATTEMPT

### 76-4-101. Attempt — Elements of offense.

(1) For purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.

(2) For purposes of this part, conduct does not constitute a substantial step unless it is strongly corroborative of the actor's intent to commit the offense.

(3) No defense to the offense of attempt shall arise:

(a) because the offense attempted was actually committed; or

(b) due to factual or legal impossibility if the offense could have been committed had the attendant circumstances been as the actor believed them to be.

**History:** C. 1953, 76-4-101, enacted by L. 1973, ch. 196, § 76-4-101.

### NOTES TO DECISIONS

#### ANALYSIS

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#### Constitutionality.

Preclusion of the defense of impossibility by this section does not violate the due process clause of the Fourteenth Amendment. *State v. Sommers*, 569 P.2d 1110 (Utah 1977).

#### Attempted burglary.

##### —Enhanced sentence.

Congress did not intend implicitly to include attempted burglary as a violent offense when it specified burglary as a violent felony under 18 U.S.C. § 924(e)(2)(B)(ii), providing for enhanced sentences in certain circumstances. *United States v. Strahl*, 958 F.2d 980 (10th Cir. 1992).

A conviction under §§ 76-4-101 and 76-6-202 for attempted burglary is not a conviction for an offense which "otherwise involves conduct that presents a serious potential risk of physical injury to another" under 18 U.S.C. § 924(e)(2)(B)(ii), providing for enhanced sentences, since attempted burglary convictions, under Utah law, may include conduct well outside Congress's target of "violent" felonies. *United States v. Strahl*, 958 F.2d 980 (10th Cir. 1992).

#### Attempted murder.

The crime of attempted murder requires proof of intent to kill. Attempted murder does not fit within the felony-murder doctrine because an attempt to commit a crime requires proof of an intent to consummate the crime. Therefore, it follows that attempted felony-murder does not exist as a crime in Utah. *State v. Bell*, 785 P.2d 390 (Utah 1989).

In order to convict defendant of attempted first degree murder, the state had the burden of proving beyond a reasonable doubt the following: (i) she had the intent to kill or knowledge that her acts would result in death if carried out; (ii) she engaged in conduct constituting a substantial step toward causing the death of her husband; and (iii) she did so either (a) by administering or attempting to administer a poison or lethal substance or a substance ad-

ministered in a lethal amount, dosage, or quantity or (b) for pecuniary or other personal gain. *State v. Johnson*, 821 P.2d 1150 (Utah 1991).

Utah does not recognize the crime of attempted depraved indifference homicide. *State v. Haston*, 846 P.2d 1276 (Utah 1993).

#### **Attempt to receive stolen property.**

Defendant who purchased property with the belief that it was stolen could be convicted of attempt to receive stolen property even though the property was not stolen. *State v. Sommers*, 569 P.2d 1110 (Utah 1977).

#### **Campaign contributions.**

Under rare fact situation presented and in view of state's stipulation that defendant had no knowledge of prohibitory statute, it was not established beyond a reasonable doubt that defendant was guilty of attempt to make a political contribution while employed as a liquor distillery representative. *State v. Granato*, 610 P.2d 1290 (Utah 1980).

#### **Common-law rule superseded.**

Former § 76-1-30 superseded common-law rule that one could not be convicted of attempt to commit crime which had in fact been completed. *State v. Burks*, 29 Utah 2d 378, 510 P.2d 532 (1973).

#### **Completed offense.**

Where defendant, charged with rape of six-year-old girl, was convicted of assault with intent to commit rape, the greater charge included the lesser and court could instruct on both; even though from evidence it might have appeared rape was actually completed, jury had power to convict defendant of lesser offense. *State v. Blythe*, 20 Utah 378, 58 P. 1108 (1899).

A person may be convicted of an attempt to commit a crime although he actually committed the offense. *State v. Garnick*, 619 P.2d 1383 (Utah 1980).

#### **Culpability.**

Attempted crimes require only the kind of culpability otherwise required for the commission of the completed offense; thus, there is no difference between the intent required as an element of the crime of attempted first degree murder and that required for first degree murder itself. *State v. Maestas*, 652 P.2d 903 (Utah 1982).

The crime of attempted forgery involves the

same culpability and dishonesty as does the crime of forgery itself. *State v. Ross*, 782 P.2d 529 (Utah Ct. App. 1989).

#### **Instructions.**

Trial court's failure to instruct that in order to convict of attempted robbery the jury must find, beyond a reasonable doubt, that defendant's conduct constituted a "substantial step" toward commission of the offense and that the substantial step must be "strongly corroborative" of defendant's intent to commit the offense was reversible error. *State v. Harmon*, 712 P.2d 291 (Utah 1986).

#### **Intent.**

Jury was justified in concluding that defendant's intent was to deprive owner of his property, in prosecution for attempt to steal a sheep, in light of defendant's possession, dominion over the sheep, lack of other explanation, and stealth in appropriation of animal. *State v. Richards*, 3 Utah 2d 368, 284 P.2d 691 (1955).

Conviction for attempted theft by receiving two horses was upheld where defendant believed horses were stolen, even though horses were not stolen but were being employed in sting operation. *State v. Powell*, 672 P.2d 96 (Utah 1983).

Proof of the "knowing" mental state required for depraved indifference homicide under § 76-5-203(1)(c) is not sufficient to satisfy the mental state required by this section. *State v. Vigil*, 842 P.2d 843 (Utah 1992).

#### **Overt act.**

Where defendant in a prosecution for attempted breaking and entering and robbery was arrested while riding in a car on his way to commit the offense, it was determined that defendant's behavior constituted more than just an intention and conspiracy to commit the offense, and that a substantial step toward commission of the offense had taken place. *State v. Pearson*, 680 P.2d 406 (Utah 1984).

**Cited in** *State v. Gutierrez*, 714 P.2d 295 (Utah 1986); *State v. Parkin*, 742 P.2d 715 (Utah Ct. App. 1987); *State v. Cantu*, 750 P.2d 591 (Utah 1988); *State v. Aase*, 762 P.2d 1113 (Utah Ct. App. 1988); *State v. Harman*, 767 P.2d 567 (Utah Ct. App. 1989); *State v. LeFevre*, 825 P.2d 681 (Utah Ct. App. 1992); *State v. Depaoli*, 835 P.2d 162 (Utah 1992); *State v. Blaha*, 851 P.2d 1205 (Utah Ct. App. 1993).

### COLLATERAL REFERENCES

**Utah Law Review.** — Note, *State v. Johnson* and Multiple Factual Theories: A Practitioner's Guide to Interpreting Utah's "Patchwork Verdict" Rules, 1993 Utah L. Rev. 907.

**Am. Jur. 2d.** — 21 Am. Jur. 2d Criminal Law § 158.

**C.J.S.** — 22 C.J.S. Criminal Law § 114.

**A.L.R.** — Attempts to commit offenses of

larceny by trick, confidence game, false pretenses, and the like, 6 A.L.R.3d 241.

Impossibility of consummation of substantive crime as defense in criminal prosecution for conspiracy or attempt to commit crime, 37 A.L.R.3d 375.

What constitutes attempted murder, 54 A.L.R.3d 612.

Changing of price tags by patron in self-service store as criminal offense, 60 A.L.R.3d 1293.

**Key Numbers.** — Criminal Law ⇌ 44.

## 76-4-102. Attempt — Classification of offenses.

Criminal attempt to commit:

- (1) a capital felony is a felony of the first degree;
- (2) a felony of the first degree is a felony of the second degree; except that an attempt to commit child kidnaping, or to commit a violation of Section 76-5-301.1 or to commit any of those felonies described in Part 4 of Chapter 5 of this title which are felonies of the first degree, is a felony of the first degree;
- (3) a felony of the second degree is a felony of the third degree;
- (4) a felony of the third degree is a class A misdemeanor;
- (5) a class A misdemeanor is a class B misdemeanor;
- (6) a class B misdemeanor is a class C misdemeanor;
- (7) a class C misdemeanor is punishable by a penalty not exceeding one half the penalty for a class C misdemeanor.

**History:** C. 1953, 76-4-102, enacted by L. 1973, ch. 196, § 76-4-102; 1983, ch. 88, § 10.

### NOTES TO DECISIONS

Cited in *State v. Slowe*, 728 P.2d 110 (Utah 1985); *State v. Parkin*, 742 P.2d 715 (Utah Ct. App. 1987).

### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d Criminal Law § 158.

**Key Numbers.** — Criminal Law ⇌ 1208(7).

## PART 2

### CRIMINAL CONSPIRACY

#### 76-4-201. Conspiracy — Elements of offense.

For purposes of this part a person is guilty of conspiracy when he, intending that conduct constituting a crime be performed, agrees with one or more persons to engage in or cause the performance of such conduct and any one of them commits an overt act in pursuance of the conspiracy, except where the offense is a capital offense, a felony against the person, arson, burglary, or robbery, the overt act is not required for the commission of conspiracy.

**History:** C. 1953, 76-4-201, enacted by L. 1973, ch. 196, § 76-4-201; 1974, ch. 32, § 8.

obstruct operation of, § 76-10-1510.

Conspiracy, pleading and proof, § 77-17-4.

**Cross-References.** — Bus, conspiracy to

## NOTES TO DECISIONS

## ANALYSIS

Agreement not to prosecute.  
Evidence.  
Indictment or information.  
Liability for conspiracy.  
Overt act.  
Cited.

**Agreement not to prosecute.**

Agreement between public officials and vice operators not to prosecute latter would have violated Subsection (5) of former § 76-12-1, defining criminal conspiracy. *State v. Erwin*, 101 Utah 365, 120 P.2d 285 (1941).

**Evidence.**

Direct and positive evidence was not essential to prove conspiracy, but circumstantial evidence was sufficient where it excluded every reasonable hypothesis except that of guilt, which must have been proven beyond a reasonable doubt; state could prove a case of conspiracy to commit extortion by and through a series of acts and declarations showing a joint design and common course of conduct to extort money under color of offices held by defendants. *State v. McIntyre*, 92 Utah 177, 66 P.2d 879 (1937).

Fact that defendant was found in hotel room with another, both possessing loaded revolvers, was insufficient evidence to prove crime of conspiracy, independent of defendant's confession. *State v. Weldon*, 6 Utah 2d 372, 314 P.2d 353 (1957).

**Indictment or information.**

Information that sufficiently charged that defendant and another conspired together to cheat and defraud by any means that, if executed, would have amounted to cheating or obtaining property by false pretenses stated

criminal conspiracy. *State v. Blake*, 36 Utah 605, 105 P. 910 (1909).

It was not necessary for indictment to allege all of agreement; it was necessary for it to allege sufficient facts to constitute the offense; fact that proof showed more than was alleged did not constitute variance or make it a conspiracy other than that charged in indictment, so long as evidence proved facts alleged. *State v. Erwin*, 101 Utah 365, 120 P.2d 285 (1941).

**Liability for conspiracy.**

Where several combined together to commit unlawful act, each was responsible for acts of his associates or confederates committed in furtherance thereof or in prosecution of common design for which they had combined. *State v. Kukis*, 65 Utah 362, 237 P. 476 (1925); *State v. Morgan*, 22 Utah 162, 61 P. 527 (1900).

**Overt act.**

Under former requirement for act in addition to agreement, overt act could, but need not have been, the very crime that was the object of the conspiracy; acts to effect the object of agreement need not have had tendency to effect such object. *State v. Erwin*, 101 Utah 365, 120 P.2d 285 (1941).

The crime of conspiracy to commit insurance fraud does not require an overt act of fraud directly against the insurance company, such as the filing of a claim, but may be evidenced by a remote act, such as paying a third party to commit arson, since the purpose of the "overt act" requirement is to show that a conspiracy is at work, and is not solely in the minds of the conspirators. *State v. Miller*, 677 P.2d 1129 (Utah 1984).

**Cited in** *Israel Pagan Estate v. Cannon*, 746 P.2d 785 (Utah Ct. App. 1987).

## COLLATERAL REFERENCES

**Utah Law Review.** — The Role of Joint Endeavor in Establishing Conspiratorial Agreement, 1979 Utah L. Rev. 133.

**Am. Jur. 2d.** — 16 Am. Jur. 2d Conspiracy § 7.

**C.J.S.** — 15A C.J.S. Conspiracy § 36.

**A.L.R.** — Actionability of conspiracy to give or to procure false testimony or other evidence, 31 A.L.R.3d 1423.

Impossibility of consummation of substantive crime as defense in criminal prosecution for conspiracy or attempt to commit crime, 37 A.L.R.3d 375.

Criminal liability of corporation for bribery or conspiracy to bribe public official, 52 A.L.R.3d 1274.

Federal criminal liability of narcotics conspirator for different substantive crime of other conspirator, 77 A.L.R. Fed. 661.

When is conspiracy continuing offense for purposes of statute of limitations under 18 USCS § 3282, 109 A.L.R. Fed. 616.

**Key Numbers.** — Conspiracy ⇌ 24.

**76-4-202. Conspiracy — Classification of offenses.**

Conspiracy to commit:

- (1) a capital felony is a felony of the first degree;
- (2) a felony of the first degree is a felony of the second degree; except that conspiracy to commit child kidnaping, or to commit a violation of Section 76-5-301.1 or to commit any of those felonies described in Part 4 of Chapter 5 of this title which are felonies of the first degree, is a felony of the first degree;
- (3) a felony of the second degree is a felony of the third degree;
- (4) a felony of the third degree is a class A misdemeanor;
- (5) a class A misdemeanor is a class B misdemeanor;
- (6) a class B misdemeanor is a class C misdemeanor;
- (7) a class C misdemeanor is punishable by a penalty not exceeding one half the penalty for a class C misdemeanor.

**History:** C. 1953, 76-4-202, enacted by L. 1973, ch. 196, § 76-4-202; 1983, ch. 88, § 11.

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d Criminal Law      **Key Numbers.** — Criminal Law ⇌ 422(1).  
§ 180.

**76-4-203. Criminal solicitation — Elements.**

(1) An actor commits criminal solicitation if with intent that a felony be committed, he solicits, requests, commands, offers to hire, or importunes another person to engage in specific conduct that under the circumstances as the actor believes them to be would be a felony or would cause the other person to be a party to the commission of a felony.

(2) An actor may be convicted under this section only if the solicitation is made under circumstances strongly corroborative of the actor's intent that the offense be committed.

(3) It is not a defense under this section that the person solicited by the actor:

- (a) does not agree to act upon the solicitation;
  - (b) does not commit an overt act;
  - (c) does not engage in conduct constituting a substantial step toward the commission of any offense;
  - (d) is not criminally responsible for the felony solicited;
  - (e) was acquitted, was not prosecuted or convicted, or was convicted of a different offense or of a different type or degree of offense; or
  - (f) is immune from prosecution.
- (4) It is not a defense under this section that the actor:
- (a) belongs to a class of persons that by definition is legally incapable of committing the offense in an individual capacity; or
  - (b) fails to communicate with the person he solicits to commit an offense, if the intent of the actor's conduct was to effect the communication.

(5) Nothing in this section prevents an actor who otherwise solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense from being prosecuted and convicted as

a party to the offense under Section 76-2-202 if the person solicited actually commits the offense.

**History:** C. 1953, 76-4-203, enacted by L. 1990, ch. 189, § 1; 1993, ch. 230, § 1. **Amendment Notes.** — The 1993 amendment, effective May 3, 1993, added Subsection (5).

### **76-4-204. Criminal solicitation — Penalties.**

Criminal solicitation to commit:

- (1) a capital felony is a first degree felony;
- (2) a first degree felony is a second degree felony;
- (3) a second degree felony is a third degree felony; and
- (4) a third degree felony is a class A misdemeanor.

**History:** C. 1953, 76-4-204, enacted by L. 1990, ch. 189, § 2.

## **PART 3**

### **EXEMPTIONS AND RESTRICTIONS**

#### **76-4-301. Specific attempt or conspiracy offense prevails.**

Whenever any offense specifically designates or defines an attempt or conspiracy and provides a penalty for the attempt or conspiracy other than provided in this chapter, the specific offense shall prevail over the provisions of this section [chapter].

**History:** C. 1953, 76-4-301, enacted by L. 1973, ch. 196, § 76-4-301. **Compiler's Notes.** — The bracketed word "chapter" was inserted by the compiler to correct an apparent error.

#### **76-4-302. Conviction of inchoate and principal offense or attempt and conspiracy to commit offense prohibited.**

No person shall be convicted of both an inchoate and principal offense or of both an attempt to commit an offense and a conspiracy to commit the same offense.

**History:** C. 1953, 76-4-302, enacted by L. 1973, ch. 196, § 76-4-302; 1974, ch. 32, § 9.

#### **COLLATERAL REFERENCES**

**Am. Jur. 2d.** — 21 Am. Jur. 2d Criminal Law § 279. **Key Numbers.** — Criminal Law ⇌ 193½, 199.  
**C.J.S.** — 22 C.J.S. Criminal Law §§ 245, 264.